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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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GREAT AMERICAN INSURANCE :  
COMPANY OF NEW YORK and NOVARTIS  
PHARMACEUTICALS CORPORATION, : **06 Civ. 13230 (WHP)**

*Plaintiffs,* :

- against - :

TA OPERATING CORPORATION d/b/a :  
TRAVELCENTERS OF AMERICA, NEW  
PRIME INC. d/b/a PRIME INC., and TA :  
OPERATING LLC, :

*Defendants.* :

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION  
IN LIMINE TO PRECLUDE TESTIMONY OF PROPOSED EXPERT NEIL  
ZOLTOWSKI ON BEHALF OF NEW PRIME, INC.**

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Plaintiffs, Great American Insurance Company of New York and Novartis Pharmaceuticals Corporation, by their attorneys, Maloof Browne & Eagan LLC, respectfully submit this Memorandum of Law in Support of Their Motion *In Limine* to Preclude Testimony of Proposed Expert Neil J. Zoltowski on behalf of New Prime, Inc. on the following grounds:

- (1) New Prime, Inc. failed to timely designate Mr. Zoltowski as an expert by the January 22, 2008 deadline as required by F.R.C.P.26(2)(A) and by order of Magistrate James C. Francis dated December 18, 2007 (Motion Exhibit 1), and in fact did not attempt to formally designate Mr. Zoltowski in writing as

their expert until they did so approximately seven months late in the Pre-Trial Order signed on August 8, 2008.

- (2) New Prime, Inc. never submitted a Report by Mr. Zoltowski on their behalf as required by F.R.C.P. 26(2)(B), as his only Report was expressly submitted solely on behalf of the TA Defendants (Exhibit 2)(confidential cost information redacted).
- (3) Mr. Zoltowski was never deposed on the subject of any Report submitted on behalf of New Prime, Inc., since no such Report was submitted. As noted, Mr. Zoltowski did timely submit a Report on behalf of the TA Defendants and was deposed on that Report. However, we are aware of no rule which permits one party to retroactively designate an expert submitted by another party or to retroactively adopt his report.
- (4) Plaintiffs are submitting with this Motion *in Limine* a parallel Motion *in Limine* to preclude Mr. Zoltowski from testifying on behalf of the TA Defendants. We incorporate herein by reference all of the arguments in that Motion in further support of this Motion to preclude New Prime, Inc. from utilizing his testimony.

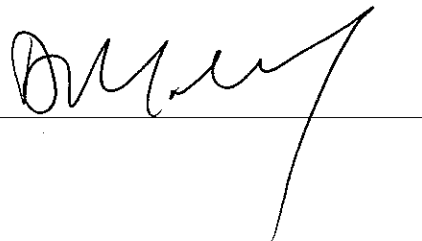
### **CONCLUSION**

Plaintiffs respectfully request that their Motion *In Limine* be granted in its entirety, and Neil J. Zoltowski be precluded from testifying as an expert at the trial of this matter.

Dated: Rye, New York  
September 10, 2008

MALOOF BROWNE & EAGAN LLC

By



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TO: All Counsel

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